

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MELVIN FREEMAN,

Defendant-Appellant.

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UNPUBLISHED

October 13, 2005

No. 256306

Wayne Circuit Court

LC No. 01-009667-01

Before: Talbot, P.J., and White and Wilder, JJ.

PER CURIAM.

In this appeal after remand<sup>1</sup> defendant challenges as of right the trial court's denial of his motion for a new trial based on newly discovered evidence. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was initially convicted of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b, after a jury trial. He was sentenced to forty-two months to twenty years in prison for armed robbery, and to two years in prison for felony-firearm. Defendant filed a motion for a new trial based on newly discovered evidence that the victim lied about the robbery. In support of his allegations, defendant presented an affidavit from a fellow inmate, Freezel (Pee Wee) Jones, who had known the victim. According to defendant, Jones told him that the victim used to frequently complain about his job and said he planned on faking two robberies and then would seek worker's compensation from his employer.

Based on defendant's affidavit, the trial court granted his motion for a new trial. Following consolidated appeals in which defendant challenged the sufficiency of the evidence (Docket No. 241589) and the prosecutor challenged the grant of a new trial (Docket No. 245852), this Court found that the trial court had abused its discretion in granting defendant's motion for a new trial without an evidentiary hearing because defendant's affidavit constituted inadmissible double hearsay. This fact precluded the admission of defendant's own assertion about the alleged conversation between the victim and Jones. This Court did find, however, that

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<sup>1</sup> *People v Freeman*, unpublished per curiam opinion of the Court of Appeals, issued September 16, 2003 (Docket Nos. 241589, 245852).

Jones could testify about the conversation pursuant to MRE 803(3). This Court remanded the matter back to the trial court for an evidentiary hearing to determine whether Jones would testify as defendant stated he would, and for the trial court to scrutinize Jones' credibility in deciding whether to grant a new trial. It also found that there was sufficient evidence presented at trial to sustain defendant's conviction in the event that a new trial was not granted on remand.

On remand, the trial court heard testimony from defendant, Jones, and Jones' ex-girlfriend, Lisa Thomas. Jones testified that he did hear defendant and a third inmate talk about defendant's case while they were together in the Wayne County Jail. He also admitted that he and defendant had spoken about the victim. Jones recognized the victim, and had spoken to him when the victim made deliveries. However, Jones denied having been told by the victim that he planned to fake a robbery. Lisa Thomas testified that she had seen Jones and the victim speak together. However, she did not hear any of the conversations. Defendant continued to maintain that Jones had told him that the victim had informed Jones about his plan to fake the robberies and sue his employer. However, despite defendant's assertion that Jones was now lying, the trial court denied defendant's motion for a new trial.

Defendant challenges the trial court's decision to deny his motion for a new trial. We review a trial court's decision to grant a new trial based on newly discovered evidence for an abuse of discretion. *People v Miller (After Remand)*, 211 Mich App 30, 47; 535 NW2d 518 (1995). For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that:

- (1) the evidence itself, not merely its materiality, was newly discovered;
- (2) the newly discovered evidence was not cumulative; (3) including the new evidence upon retrial would probably cause a different result; and (4) the party could not, using reasonable diligence, have discovered and produced the evidence at trial. [*People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996).]

In order to find that there is a reasonable probability that the result of the proceeding would have been different, defendant must show that there "is a probability sufficient to undermine confidence in the outcome." *People v Lester*, 232 Mich App 262, 280 n 11; 591 NW2d 267 (1998).

The lack of any admissible evidence in support of his claim that victim planned to fake the robberies renders defendant's position untenable. As this Court has previously held, defendant's own allegations are not admissible. Accordingly, the trial court rejected them as non-probative. The trial court correctly found that defendant had not presented sufficient support for his motion for a new trial. *People v Darden*, 230 Mich App 597, 606; 585 NW2d 27 (1998). No abuse of discretion occurred.

Affirmed.

/s/ Michael J. Talbot  
/s/ Helene N. White  
/s/ Kurtis T. Wilder